

Pushing the Boundaries of Legal Normality

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2020-04-10T17:52:10

Emilio Meyer and Thomas Bustamante [thoroughly analyzed](#) the Brazilian government's response to the COVID-19 pandemic. They conclude that the Brazilian case "seems to show that emergency powers may not be necessary for a situation of health crisis" as the Brazilian [Emergency Constitution](#) – a set of emergency provisions enshrined in our founding document – is still dormant. Indeed, in their words, what we see in Brazil is the use of the "legislative and executive apparatuses" to "enforce measures for protecting public health". But that does not mean, that emergency powers in Brazil are not yet in reach.

Not a Brazilian Orbán

Notwithstanding our latent Emergency Constitution, I do not believe that Brazil is an example of a country that is handling the coronavirus outbreak without the aid of emergency powers. I agree that Bolsonaro, [unlike Orbán](#), will not be taking advantage of the crisis to bootstrap himself into a more authoritarian position anytime soon. Brazil's President is so isolated that one can reasonably conclude that he has completely lost control over the federal government.

[Public opinion polls](#) show that the Health Minister, Luiz Mandetta, enjoys significantly more public support than the President. While Bolsonaro refuses to acknowledge the true extent of the crisis, having notoriously called it "[a little flu](#)", Mandetta, on the other hand, is publicly antagonizing his boss by [promoting social distancing](#) as the only efficient nationwide policy at this time. The stalemate reached its climax on April 6th, when Bolsonaro [threatened to remove Mandetta](#) from the ministry, only to disgracefully concede defeat a few hours later due to a major backlash. So far it looks like the military leadership that sponsored his presidential bid in 2018 [had the final say](#) on the matter.

In sum, Bolsonaro currently does not look like a promising candidate for exercising emergency powers at this moment. He lacks meaningful political support and is facing the upheaval of his own cabinet. In fact, state governments are the [real protagonists](#) in the fight against the novel coronavirus. Nevertheless, it is my understanding that we cannot leapfrog from the evaluation of the current political landscape to the conclusion that there are no emergency powers on the table. This conclusion only makes sense if the analysis is limited to the Neo-Roman model of emergency powers.

The legislative model too gives birth to a state of emergency

Under that paradigm, which is modeled after the Roman dictatorship, emergency powers are vested in the executive and should be exercised both in a conservative and temporary fashion. The scope of these extraordinary entitlements and the actors involved in identifying and ultimately declaring the state of emergency are all stipulated *ex ante* in the constitutional text. If, for whatever reason, the constitutional roadmap is not followed, one can argue that no emergency plan was actually set in motion.

Nevertheless, the Brazilian case is an example of how political elites may be willing to operate under a new model of emergency powers, which involves a novel and intricate political calculus. Accordingly, my argument relies on the [“legislative model”](#) that was theoretically crafted by Farejohn and Pasquino more than a decade ago. Under this model, Congress can bypass the Emergency Constitution and arrive at a comparable legal destination.

The model’s blueprint is quite simple. The government deals with an emergency the same way it would deal with other managerial issues: by delegating power to the executive branch through ordinary legislative means. Instead of relying on the powers that were set forth by the Emergency Constitution, Congress itself gets to decide what the emergency powers look like. The legislature can then draw from a comparative catalog only those powers that are more appealing given the situation that the country is facing. As Farejohn and Pasquino argue, the legislative model is more flexible and allows for legislative oversight of the executive during the emergency. Congress also has the prerogative of ending the emergency when it sees fit.

This model raises a number of potential problems that [Farejohn and Pasquino address in depth](#). My point is that the legislative model gives birth to a state of emergency just like the activation of the Emergency Constitution would. I rely, of course, on a dualistic view of governmental powers. The ‘norm’ is what one may call regular government. This ‘norm’ is derogated under the state of emergency to allow public officials to perform certain actions that would otherwise be prohibited (or at least limited). This thin definition of a state of emergency highlights the fact that such derogation can happen either through constitutional or ordinary legislative means.

The legal system operating outside the boundaries of legal normality

To say the least, these are exceptional times. And the Brazilian legal system is responding accordingly by authorizing exceptional legal actions. The signs are hard to miss. On March 20th, Congress enacted a [“legislative decree”](#) in which it declares a “state of public calamity”, invoking the powers granted by the complementary law n. 101. This declaration has two distinct effects. First, it suspends important statutory

limitations and allows the government to expend more financial resources to fight the pandemic than it would otherwise be authorized to. Second, and most importantly, it creates an oversight committee that will be responsible for tracking governmental expenditure related to the public health emergency.

The Brazilian legal system has a strong attachment to the principle of “fiscal responsibility”. Political debates aside, a President was just impeached for allegedly breaching this principle. In ordinary times, the government is severely limited in its ability to manage its own purse. However, this can be “one limitation too much” when the country’s public health system is overwhelmed by a pandemic. In this case, an exception is justified so the government can expend more money to deal with a developing situation.

After a formal request was made by the executive, Congress agreed to offer this exception through ordinary legislative means. Yet this hardly means we are still operating within an ordinary legal framework. Quite the contrary, the Brazilian government is authorized to go beyond existing legal limits so it can minimize the effects of the COVID-19 pandemic. Yes, Bolsonaro is still urging his supporters to defy science and go on with their normal lives. But this should not blind us to the fact that the Brazilian legal system is not operating within the boundaries of legal normality.

The door to the realm of emergency powers is open

While [Emilio Meyer and Thomas Bustamante’s political investigation](#) is flawless and even mind-boggling (something only Bolsonaro can add to the mix during such trying times), they do not account for how these boundaries of legal normality have already been pushed.

One can counter my arguments by saying that this is a mild form of emergency. “Better to allow for a breach of the principle of ‘fiscal responsibility’ than to follow Orbán’s footsteps and end up jailing journalists for spreading fake news.” I do not contest that. However, the door that leads us to the realm of emergency powers is already open. While we patiently wait for the Emergency Constitution to wake up from its doctrinal sleep, Congress has already bypassed it and is venturing into uncharted territory. We have to stay vigilant or risk being caught off guard.

